ufacturer and article manufactured, does not apply here. The analogy appears hardly close enough, and not quite fair. The issue presents itself—Is a libel as to the performance of a play like "The Labyrinth," an attack on the play as totally distinct from the artist?

The critic attacked the production for baseness, suggestiveness and immorality. If we take into account, as we must, the unity of artist and play in any serious performance, the merging of the personality of the performer into her "part," and the fact that the selection is her own, can we condemn the play, as she plays it, without also casting some reflection upon her? Especially in dramas of such type, often the interpretation by the actor is a factor as vital as the inanimate product of the author. "Carmen," in the hands of a lover of the beautiful, is the highest art; yet it can be, and has been, made a vulgar show. Whether we can hiss the immoral "thing" so that the person goes into hysterics, and cast no stigma on her, is a question open to nice distinction. At all events, the case under discussion will not settle for most legal thinkers the exact difference between a libel on property and a libel on its owner. S. W. D.

THE CONFLICT BETWEEN A PATENTEE'S RIGHT TO MONOPOLY AND A STATE ANTI-MONOPOLY STATUTE.—A corporation doing intrastate business is subject to the anti-trust laws of a State wherein it does business even though its principal violation of such laws is a combination of firms dealing chiefly in articles covered by United States patents. The State under its laws may withdraw the right of such a corporation to do business within its borders. This view was upheld in *State* v. *Creamery Package Mfg. Co.*, 132 N. W. 268, wherein the court affirmed its earlier decision, reported in 110 Minn. 415, 126 N. W. 126, 623, 136 Am. St. Rep. 514.

There is a sharp conflict of authority in regard to a restraint on articles all of which are patented. The same division is carried into the conflict when the presence of patented articles is claimed to leaven the entire transaction so as to legalize it in its entirety.

The view of the authorities holding that the virtue of a patent grant prevents the State from interfering with the patentee is well expressed in the words of a federal court:

"In consideration that a patentee will give his invention to the public with full drawings and specifications, so as to enable the public to freely use it at the expiration of seventeen years, a grant is made to him of the exclusive right to the monopoly of the patented article during that time. The rights so acquired by the patentee under a grant from the United States are entirely inconsistent with the patentee being made subject to the provisions of the anti-trust laws of the several states." *Columbia Wire Co.* v. *Freeman Wire Co.*, 71 Fed. 302; *Edison Electric Light Co.* v. *S. M. Electric Light Co.*, 53 Fed. 592; *Strait* v. *Nat. Harrow Co.*, 51 Fed. 819; *American Soda Fountain Co.* v. *Green*, 69 Fed. 333.

Or to view the question from the other side, as expressed in *Grover & Baker Sewing Machine Co.* v. *Butler*, 53 Ind. 454, 21 Am. Rep. 200 (at page 204) if the State were not barred from interfering, "it is easy to see that a

State could impose terms which would result in a prohibition of the sale of this species of property within its borders, and in this way nullify the laws of Congress which regulate its transfer, and destroy the power conferred on Congress by the Constitution." *Accord*: *Walter A. Wood Mowing Machine Co.* v. *Caldwell*, 54 Ind. 270, 23 Am. Rep. 641; *Taylor* v. *Blanchard*, 13 Allen 370, 90 Am. Dec. 203; *U. S. Seeded Raisin Co.* v. *Griffin & Kellogg Co.*, 126 Fed. 364.

Probably the strongest case which seems to indicate that the States cannot interfere is *Bement* v. *National Harrow Co.*, 186 U. S. 70. In this case the United States Supreme Court intimates that the rule of such cases as *Patterson* v. *Kentucky*, 97 U. S. 501, does not apply except to special cases. The court holds the acquisition of patents to be legal. Yet as suggested in *Hartman* v. *J. D. Parks & Sons Co.*, 145 Fed. 358, there is a distinction between the case of a restraint by the patentee, resulting through the exercise of patent rights, and the case of a combination of firms, resulting in a restraint of a *business* involving patent rights, as in the principal case. Most of the cases which hold with the *Bement* case, are distinguishable on this ground. They follow the early case of *Heaton-Peninsular Co.* v. *Eureka Specialty Co.*, 47 U. S. App. 146, which is a case wherein a single patentee was allowed to continue an exclusive control of his invention by restrictions on the user thereof.

It is, moreover, noticeable that the cases which seemingly go contrary to the principal case, are cases concerning *patent rights*. The Minnesota case concerns articles of commerce, both patented and otherwise. And as was said in *Patterson* v. *Kentucky, supra,* in the case of an oil patent in regard to which the State regulation was held valid, the State cannot regulate a patent right, "but when the fruits of the invention, or the article made by reason of the application of the principle discovered, is attempted to be used or sold within the jurisdiction of a State, it is subject to its laws like other property." Or, as stated in *State* v. *Telephone Co.*, 36 Ohio St. 296, 38 Am. Rep. 583, "the right to enjoy a new and useful invention may be secured to the inventor and protected by national authority against all interference; but the use of tangible property which comes into existence by the application of the discovery is not beyond the control of the State legislation simply because the patentee acquires a monopoly in his discovery."

The Constitution says, Art. I, § 4, that Congress shall have the power "To promote the Progress of Science and useful Arts, by securing for limited times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." The clause is a general welfare clause. Clearly, it is not within the spirit of this clause any more than of any other part of the Constitution, to hamper the development of inventions which are advantageous to the public. It gives Congress the right to "*promote* the progress of science and the useful arts" by granting patents. As said in *Warner* v. *Smith*, 13 App. D. C. 111, at page 114, "the provision, it will be noticed, is not to benefit the inventor primarily, but the public. * * * The interests of the public are therefore, the primary consideration and to these the privileges granted to inventors are secondary and subordinate." Or as said in *Hoe et al.* v.

Knap et al, 27 Fed. 204, where a patentee failed to use his invention for a long period, whereupon someone else did use it, that "under a patent which gives a patentee a monopoly, he is bound either to use the patent himself or to allow others to use it on reasonable or equitable terms." Clearly, then the Constitution means that patent rights shall be used for the benefit of the public. And the laws of Congress have always been pointed that way.

A grant under the patent clause does not mean an unlimited right to go ahead absolutely untrammeled by any restraint. If this were the case, the patent laws would contain more rules and regulations for the use of patents. They would be more than mere directory laws. *People* v. *Russell*, 49 Mich. 617, 14 N. W. 568, 43 Am. Rep. 478; *State* v. *Cook*, 107 Tenn. 499, 62 L. R. A. 174. *Contra*: *State* v. *Butler*, 71 Tenn. (3 Lea) 222. As it is today, letters patent are issued as a matter of course to any person who applies by sending in the papers and the fee, and swearing that he is the inventor of the article. Congress makes no attempt to regulate, yet it is perfectly obvious that some patented articles necessarily require regulation and legislation, as for example, a patented inflammable oil. *Patterson* v. *Kentucky*, 97 U. S. 501; *Jordan* v. *Overseers of Dayton*, 4 Ohio 295.

If the patent from the government excluded the State, the State could not require the patentee to obtain a license before selling the right to make or sell the patented article, as in *Burns* v. *Sparks*, 26 Ky. Law Rep. 688; *Nunn* v. *Citizens Bank*, 107 Ky. 262. Nor could a State limit the price which a telephone company might charge for its patented article or facilities. *Hockett* v. *State*, 105 Ind. 250; *State* v. *Telephone Co.*, 36 Ohio St. 296, 38 Am. Rep. 583. *Contra*: *A. R. Telephone Co.* v. *Conn. Telephone Co.*, 49 Conn. 352. Nor could a State tax any patented property, or subject the incomes of patents to a general income tax, if the patent clause of the Constitution took the patented article entirely outside of any control by State laws or regulations.

By the grant of letters patent, a person is given no more right to make, use or vend an article than he possessed before. "The sole operation of the statute is to enable him to prevent others from using the product of his labors without his consent; but his own right of using is not enlarged or affected." *State* v. *Telephone Co., supra*; *Bloomer* v. *McQuewan*, 14 How. 539, 14 L. Ed. 532; *Continental Paper Bag Patent Case*, 210 U. S. 405, 424, 52 L. Ed. 1122. Existing rights are enlarged only in so far as they affect third parties. "By the terms of the patent, he has the exclusive right to make, use and vend. The right to make, use and vend, he has without the grant of letters patent. When we say that a patent grants an 'exclusive right,' we do not mean that the right to make, use and vend is granted, but only that the patentee's existing right is made exclusive by the grant." *Blount Mfg. Co.* v. *Yale & Towne Mfg. Co.*, 166 Fed. 555, 558.

But while the patent has this effect in respect of third parties, it does not necessarily follow that the public is deprived of control over the patentee or over patented articles. Consequently the grant of a patent does not give the patentee a right to violate the laws of any State. "While it is true that letters patent secure a monopoly in the thing patented, so that the right to make, vend, or use the same is vested exclusively in the patentee,—for a lim-

ited time—it is not true that a right to make, vend or use the same in a manner which would be unlawful except for the letters patent thereby becomes lawful under the act of Congress and beyond the power of the States to regulate and control." *State* v. *Telephone Co. supra.* "Congress never intended that the patent laws should displace the police powers of the States, * * * Whatever rights are secured to inventors must be enjoyed in subordination to this general authority of the State over all the property within its borders." *Webber* v. *Virginia,* 103 U. S. 344. And the same court in *Patterson* v. *Kentucky, supra,* said, page 503, in speaking of patent rights: "Obviously this right is not granted or secured without reference to the general powers which the several States of the union unquestionably possess over their purely domestic affairs, whether of internal commerce or of police." In the same case the court quoted with approval the opinion of *Jordan* v. *Overseers of Dayton,* 4 Ohio 295, where the court said, "an attempt by the legislature in good faith, to regulate the conduct of a portion of its citizens in a matter strictly pertaining to its internal economy, we cannot but regard as a legitimate exercise of power, although such law may sometimes indirectly affect the enjoyment of rights flowing from the federal government."

The principal case follows what seems to be the view sustained by the greater weight both in authority and logic. That a combination of business interests may be a restraint of trade even where patent rights are concerned, is clearly shown in *National Harrow Co.* v. *Hench et al,* 83 Fed. 36, 27 C.C.A. 349, 39 L. R. A. 299; *National Harrow Co.* v. *Quick et al,* 67 Fed. 130. In those cases the company bought up patents on a certain kind of patented harrow, and thus controlled the market. And in *Mines* v. *Scribner et al,* 147 Fed. 927, and a number of similar cases, it was held that a combination affecting the sale of books by publishers to middlemen was a restraint as meant by the federal anti-trust law, even though most of the books so sold were copyrighted. And such a restraint, when interfering with local trade, would be a subject for local laws. For generally speaking, the "express grant of power to regulate commerce among the States has always been understood as limited to its terms; and as a virtual denial of any power to interfere with the internal trade and business of separate States." *United States* v. *Dewitt,* 9 Wall. 41. "The power of Congress is only to define the right of property; it does not extend to regulating the use of it; that must be exclusively of local cognizance." KENT in *Livingston* v. *Van Ingen,* 9 Johns. 507, 581.

Probably no better summary of the matter could be made than that expressed in *Webber* v. *Virginia,* 103 U. S. 344-347, where the court says "The legislation respecting the articles which the State may adopt after the patents have expired, it may equally adopt during their continuance. It is only the right to the invention or discovery—the incorporeal right—which the State cannot interfere with. Congress never intended that the patent laws should displace the police powers of the State, meaning by that term those powers by which the health, good order, peace and general welfare of the community are promoted. Whatever rights are secured to inventors must be enjoyed in subordination to this general authority of the State over all property within its limits."

V. R. J.